

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KELLY SCHWEIGHAUSER	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 06-1397
	:	
JO ANNE B. BARNHART,		
Commissioner of Social Security		

**MEMORANDUM AND ORDER**

AND NOW, this 17<sup>th</sup> day of November 2006, upon consideration of plaintiff's brief and statement of issues in support of request for review (Doc. No. 8) and the response and reply briefs thereto (Doc. Nos. 11 and 14), the Court makes the following findings and conclusions:

A. On January 2, 2004, Kelly Schweighauser ("Schweighauser") protectively applied for disability insurance benefits ("DIB") and supplemental security income ("SSI") under Titles II and XVI, respectively of the Social Security Act, ("Act") 42 U.S.C. §§ 401-433, 1381-1383f. (Tr. 33-35; 182-84). Throughout the administrative process including a May 24, 2005, hearing before an administrative law judge ("ALJ"), Schweighauser's claim was denied. (Tr. 5-7; 16-21; 22; 23; 24-25). Pursuant to 42 U.S.C. § 405(g), Schweighauser then sought judicial review in this Court.

B. The ALJ found Schweighauser's degenerative disc disease, osteoarthritis, fibromyalgia, and depressive disorder impairments to be severe. (Tr. 18 ¶ 3; 20 Finding No. 3 ).<sup>1</sup> However, the ALJ found that the impairments were not severe enough to meet or medically equal a listing. (Tr. 18 ¶ 3; 20 Finding No. 4). The ALJ further concluded that Schweighauser had the residual functional capacity ("RFC") to perform simple, unskilled light and sedentary work that did not involve bending, kneeling, or crouching and which allowed her to alternate between sitting and standing. (Tr. 19 ¶ 2; 20 Finding No. 5). The ALJ also determined that Schweighauser was not disabled. (Tr. 19 ¶ 6; 21 Finding No. 11).

C. The Court has plenary review of legal issues, but reviews the ALJ's factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm'r of Soc. Sec., 181 F.3d 429, 431 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a

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<sup>1</sup> All numbered paragraph references to the ALJ's decision begin with the first full paragraph on each page.

mere scintilla but may be less than a preponderance. See Brown v. Bowen, 845 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ's conclusion is supported by substantial evidence, this Court may not set aside the Commissioner's decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

D. Schweighauser raises several arguments that the ALJ's determination was legally and factually erroneous. Because the Commissioner did not apply the proper legal standards and because his determination is not supported by substantial evidence, I must remand to allow the Commissioner to conduct the proper analysis.<sup>2</sup>

1. Schweighauser argues that the case should be remanded because the ALJ erred in making his mental RFC determination by failing to discuss evidence in the record and improperly dismissing the opinions of her treating psychiatrist.

A. "The ALJ must consider all the evidence and give some reason for discounting the evidence she rejects." Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999). Muhammed Shamsi, M.D. ("Dr. Shamsi"), who performed a psychiatric evaluation on Schweighauser, determined that Schweighauser had a GAF of 45, which the ALJ did not mention or discuss. (Tr. 144-46). In referring to the records from the Neuro-Psychiatric Group, the ALJ stated that Schweighauser had been assessed GAFs ranging from 55 to 80, which he used to conclude that Schweighauser only had "mild to moderate impairments in her social and occupational functioning." (Tr. 18). However, Maria Pena-Ariet, M.D. ("Dr. Pena-Ariet"), who assessed Schweighauser with numerous GAFs over the course of the treatment from October 30, 2003 to May 3, 2005, determined Schweighauser had a GAF of 50 in October of 2003, GAFs of 45 and 50 in November of 2004, and a GAF of 50-55 in January of 2005. (Tr. 206; 213; 215; 252). A GAF of 40-50 denotes "serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 32 (4<sup>th</sup> ed. 2000). Since GAFs from 45 to 50 indicate that the person cannot perform competitive work on a sustained basis and the ALJ apparently rejected Dr.

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<sup>2</sup>I did consider the records contained on pages 192 to 253 of the transcript in my substantial evidence review. Although the Commissioner is correct in asserting that evidence that was not before the ALJ cannot be used to argue that the ALJ's decision was not supported by substantial evidence, the evidence shows that these exhibits were before the ALJ. See Jones v. Sullivan, 954 F.2d 125, 128 (3d Cir. 1991). At the hearing on May 24, 2005, Schweighauser's attorney informed the ALJ that a request had been made to Maria Pena-Ariet, M.D. ("Dr. Pena-Ariet") for records, and, as a result, the ALJ indicated that the record would remain open for two weeks. (Tr. 290). Two days later, Schweighauser's attorney sent the ALJ a letter enclosing medical records dated October 30, 2003 to May 9, 2005 from the Neuro-Psychiatric Group, of which Dr. Pena-Ariet is a member. (Tr. 192). Although the medical records index does not mention exhibit 20F, the ALJ refers in his determination to records from the Neuro-Psychiatric Group as exhibits 12F and 20F. (Tr. 2-3; 18 ¶ 1). The court notes that four of the five pages included in exhibit 12F are also included in pages 192 to 253, however the records in question are far more extensive than exhibit 12F. (Tr. 139-40; 141-42; 236; 247-48). Although the records are listed as Exhibit AC-1, the discussion at the hearing, the letter, the reference by the ALJ, and the fact that the ALJ referred in his determination to GAFs that were found only in those records, led the court to conclude that these records were before the ALJ. (Tr. 18 ¶ 1; 139; 146; 192-253).

Shamsi's and Dr. Pena-Ariet's opinions, the ALJ erred in failing to explain his decision to do so. Thus, the case must be remanded for such an explanation.

B. As for the opinion of her treating psychiatrist, Maria Pena-Ariet, M.D. ("Dr. Pena-Ariet"), I first note that an ultimate disability determination is reserved for the ALJ and a treating physician's opinion on that topic is not entitled to any special significance. 20 C.F.R. §§ 404.1527(e)(1); S.S.R. 96-5p. Furthermore, a treating physician is only provided controlling weight when his or her opinion is well supported by medically acceptable sources and not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2). Dr. Pena-Ariet opined that Schweighauser's impairments would have a marked effect on her ability to respond appropriately to supervisors and changes in her work setting.<sup>3</sup> (Tr. 180). The ALJ dismissed the doctor's findings based on Schweighauser's allegedly mild to moderate GAFs and her activities of daily living. (Tr. 18 ¶ 4). Since I found the ALJ improperly failed to discuss and evaluate the more serious GAFs in the record, the ALJ should reevaluate Dr. Pena-Ariet's opinions based on consideration of all of the evidence and, if the ALJ chooses to once again reject Dr. Pena-Ariet's opinions, the ALJ should more fully discuss his reasons for doing so.<sup>4</sup>

2. Since the ALJ did not appear to give full consideration to the record before him, the court will not make a ruling on Schweighauser's remaining arguments regarding the ALJ's step three evaluation and his assessment of Schweighauser's credibility. The ALJ is directed to reevaluate these issues once he has fully examined the record in accordance with the proper procedures and legal standards.

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner did not apply the correct legal standards and that the record does not contain substantial evidence to support the ALJ's findings of fact and conclusions of law. As a result, the action must be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g).

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<sup>3</sup>I note that Dr. Shamsi came to the same conclusion, and the V.E. stated those limitations would make the hypothetical individual unable to sustain continuous competitive work. (Tr. 149; 288).

<sup>4</sup>The court notes that the ALJ also failed to explain his rejection of the opinion of Sally Pullman-Mooar, M.D. ("Dr. Pullman-Mooar"), a rheumatologist who treated Schweighauser for more than seven years. (Tr. 118-19; 173-77). Although the ALJ noted in his decision that Dr. Pullman-Mooar found Schweighauser was only capable of sitting, standing, and walking for less than two hours over the course of the work day, the ALJ failed to give any explicit rejection of her opinion, which the V.E. testified would make Schweighauser unable to perform competitive work. (Tr. 17 ¶ 2; 175; 289). Dr. Pullman-Mooar also stated that Schweighauser's pain was constantly severe enough to interfere with her attention and concentration; she was incapable of tolerating even a low stress job; and she would have to be absent more than four times a month, which the V.E. stated would not allow for competitive employment. (Tr. 174; 177; 289-90). The ALJ did not even mention any of these conclusions or offer a general explanation for why he was discounting her opinion. On remand, if the ALJ chooses once again to reject her opinion as not supported by the record, he should offer a clear explanation of his decision.

Therefore, it is hereby **ORDERED** that:

1. The request for judicial review by Kelly Schweighauser is **GRANTED** to the extent that the matter is **REMANDED** for further proceedings consistent with this order and **JUDGMENT IS ENTERED REVERSING THE DECISION OF THE COMMISSIONER OF SOCIAL SECURITY** for the purposes of this remand only; and
2. The Clerk of Court is hereby directed to mark this case closed.

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LOWELL A. REED, JR., S.J.